

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:NFL:JAX:TL-N-2068-00

WRMcCants

date: June 1, 2000

to: Chief, Quality Measurement Branch, North Florida District
Attn: Caroline Workman

from: District Counsel, North Florida

subject: [REDACTED]

Possible Violation of I.R.C. Section 6501(c)(4)(B)

This is in response to your memorandum dated April 4, 2000, in which you questioned the effect of a possible failure to comply with the requirements of I.R.C. § 6501(c)(4)(B) in an agreed TEFRA case in which the statute would have expired March 15, [REDACTED] absent the statute extension. We regret that our response was delayed since it was necessary to clear any advice on this issue with our National Office.

ISSUE

Whether the three-year assessment statute of limitations has expired, since it is not clear whether the requirements of I.R.C. § 6501(c)(4)(B) were met in an agreed TEFRA case as an obsolete Publication 1035 may have been sent with the statute extension request?

CONCLUSION

Absent more facts, we are unable to advise whether the statute of limitations has expired, since it is not clear whether the requirements of I.R.C. § 6501(c)(4)(B) were met when the extension was solicited. However, we suggest that you proceed as if the extension is valid since a version of Publication 1035 was sent to the taxpayer.

DISCUSSION

According to the information forwarded in the present case, the taxpayer is a TEFRA entity that filed a Form 1120-S for the taxable year [REDACTED] on or before the March 15, [REDACTED] due date. An examination begun in [REDACTED], resulted in a proposed income adjustment of approximately \$[REDACTED] in additional gross receipts, with which adjustment the taxpayer's tax matters partner and the

partners have agreed, by signing agreements in early [REDACTED]. The agreements have not yet been executed on behalf of the Internal Revenue Service.

Since the three-year assessment statute of limitations would normally have expired on March 15, [REDACTED], the revenue agent in [REDACTED], solicited, received, and had fully executed, a statute extension (Form 872-S (Rev. 6-91)). The extension was solicited by means of a form letter, Form 907(DO) (Rev. 7-79), attaching thereto instructions (a Publication 1035 of unknown date) to the taxpayer for extending the statute of limitations. Accordingly, it is unclear whether the Publication 1035 was the latest revision (Rev. 12-1999) intended to comply with Internal Revenue Code § 6501(c)(4)(B). The memorandum to this office indicates that the statute extension employed (Form 872-S (Rev. 6-91)), was obsoleted by a later statute extension form (Form 872-S (Rev. 11-92)). We know of no problem associated with the use of the older Form 872-S.

In an undated memorandum distributed on or about March 31, 2000, Chief Counsel provided the following advice to the field:

SUBJECT: Implementation of Section 6501(c)(4)(B)

The purpose of this memorandum is to provide guidance to Counsel attorneys regarding new section 6501(c)(4)(B) of the Internal Revenue Code, as enacted by section 3461(b) of the IRS Restructuring and Reform Act of 1998 (RRA 98). This provision applies to requests to extend the period of limitations made after December 31, 1999.

Background

New section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time. This notice must be provided each time an extension is requested. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that in some cases taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

As part of RRA 98 training, Service personnel were instructed that section 6501(c)(4)(B) can be satisfied by informing taxpayers, either orally or in writing, of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame. Service personnel were advised to secure consents to extend statutes of limitations by sending Letter 907(DO) (Rev. 2-2000) or Letter 907(SC) (Rev. 12-1999). See IRM 4541.1 and IRM 121.2.22.3. Service personnel were advised they could provide the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999), each time a statute extension was requested, but the best practice would be to advise taxpayers of their rights by sending Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999), or Letter 967 (Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.) Service personnel were instructed to document their actions.

It has come to the attention of this office that, notwithstanding the implementation procedures summarized above, in certain cases, consents to extend the period of limitations may have been requested after January 1, 2000, without following the requirements of section 6501(c)(4)(B). In addition, it appears that consents to extend the period of limitations may have been requested after January 1, 2000, using the prior versions of Letter 907, Letter 967 and Publication 1035.

It is possible that courts may not sustain the validity of extensions obtained where there was not strict compliance with the provisions of section 6501(c)(4)(B). As a purely precautionary measure, instructions were recently transmitted to the Assistant Commissioner (Examination), the National Director of Appeals, and all Service Center Directors, the Service personnel responsible for securing extensions, with respect to the requirements of section 6501(c)(4)(B).

Procedures

Service personnel have been instructed to check their inventories for cases where extensions were requested after December 31, 1999. If Service personnel did not follow section 6501(c)(4)(B), and the period of limitations would remain open on those cases absent the extension, Service personnel are to request new extensions following the proper procedures. Specifically, Service personnel have been instructed to examine the administrative file to determine

whether Form 9984, Examining Officer Activity Record, or other written documentation, reflects that section 6501(c)(4)(B) was followed when the extension was requested.

It is the position of this office that section 6501(c)(4)(B) has been followed and we will defend the validity of the extension if the Form 9984, or other written documentation in the administrative file, reflects that the extensions were requested in one of the following scenarios:

- Service personnel requested the extension by using Form Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999) or Letter 967 (Rev. 12-1999;
- Service personnel furnished the taxpayer or representative with a copy of any of these specific revisions of Publication 1035: Rev. 12-1999, Rev. 8-1996, or Rev. 8-1987;
- Service personnel orally advised the taxpayer or representative of all the provisions of section 6501(c)(4)(B) and documented this action contemporaneously in writing on Form 9984 or elsewhere in the administrative file;
- The taxpayer or representative declined to sign an unrestricted extension, Form 872-A, and instead signed a restricted extension that either limited the extension to certain issues or certain time periods;
- The taxpayer refused to sign a restricted extension, Form 872, as originally prepared by the Service, and instead signed one containing additional restrictions, such as a shorter time period or fewer issues. See IRM 22.8.4(1);

In all other cases, where it appears that the provisions were not followed, we recommended that Service personnel immediately contact District Counsel for expedited legal advice regarding the validity of the extension. Service personnel have been advised to provide the facts of the particular case, including the circumstances under which the extension was secured, the type of tax, the taxpayer, the tax period(s), and the potential adjustments, to District Counsel. Service personnel have also been advised to be prepared to issue timely statutory notices of deficiency for those cases where the statute, without the extension, will expire on April 15, 2000, while District Counsel considers whether the extensions are valid. District Counsel should

make a recommendation on a case by case basis regarding whether the extension is valid and immediately coordinate all advice with the Procedural Branch of the Field Service Division. The Procedural Branch will determine the validity of the extensions in question on a case by case basis. If the Procedural Branch determines that the extension is invalid, and an extension cannot be secured, a statutory notice of deficiency should be issued.

In addition, any Tax Court or tax refund litigation case raising an issue under section 6501(c)(4)(B) should be coordinated immediately with the Procedural Branch of the Field Service Division.

For further information regarding this notice contact the Procedural Branch at (202) 622-7940 or (202) 622-7950.

Accordingly, you have requested our advice as to the validity of the statute extension in the present case.

ANALYSIS

The expiration of the assessment statute of limitations is an affirmative defense that must be raised to be considered. Once raised, however, the burden of proving in litigation that there exists a valid statute extension falls on the Internal Revenue Service. See, e.g., T.C. Rules 39, 142(a). I.R.C. § 6501(c)(4)(B) was enacted in 1998 to require the Service to notify taxpayers of their rights regarding execution of statute of limitations extensions.

The Conference Committee Explanation of the IRS Restructuring and Reform Act of 1998 provided as follows:

Present Law

The statute of limitations within which the IRS may assess additional taxes is generally three years from the date a return is filed. Prior to the expiration of the statute of limitations, both the taxpayer and the IRS may agree in writing to extend the statute. An extension may be for either a specified period or an indefinite period. The statute of limitations within which a tax may be collected after assessment is 10 years after assessment. Prior to the expiration of the statute of limitations on collection, both the taxpayer and the IRS may agree in writing to extend the statute.

House Bill

The House bill requires that, on each occasion on which the

taxpayer is requested by the IRS to extend the statute of limitations, the IRS must notify the taxpayer of the taxpayer's right to refuse to extend the statute of limitations or to limit the extension to particular issues.

Effective Date

Requests to extend the statute of limitations made after the date of enactment.

Senate Amendment

The Senate amendment eliminates the provision of present law that allows the statute of limitations on collections to be extended by agreement between the taxpayer and the IRS. The Senate amendment also requires that, on each occasion on which the taxpayer is requested by the IRS to extend the statute of limitations on assessment, the IRS must notify the taxpayer of the taxpayer's right to refuse to extend the statute of limitations or to limit the extension to particular issues.

Effective Date

Requests to extend the statute of limitations made after December 31, 1999 and to all extensions of the statute of limitations on collection that are open on December 31, 1999.

Conference Agreement

The conference agreement follows the Senate amendment, except that extensions of the statute of limitations on collection may be made in connection with an installment agreement; the extension is only for the period for which the waiver of the statute of limitations entered in connection with the original written terms of the installment agreement extends beyond the end of the otherwise applicable 10-year period, plus 90 days.

Effective Date.

Requests to extend the statute of limitations made after December 31, 1999. If, in any request to extend the period of limitations made on or before December 31, 1999, a taxpayer agreed to extend that period beyond the 10-year statute of limitations on collection, that extension shall expire on the latest of: the last day of such 10-year period, December 31, 2002, or, in the case of an extension in connection with an installment agreement, the 90th day after the end of the period of such extension.

The resultant I.R.C. § 6501(c)(4)(B) expressly provides as follows:

Notice to taxpayer of right to refuse or limit extension. The Secretary **shall notify** the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, **on each occasion** when the taxpayer is requested to provide such consent.

(Emphasis added). The statute, therefore, is fairly clear, and unequivocal. It does not provide for alternatives, exceptions, or much interpretative "leeway."

Absent more facts, we are unable to advise whether the statute of limitations has expired, since we do not know whether the current Publication 1035 was sent with the statute extension request. Obviously, if a current, correct Publication 1035 was provided to the taxpayer, the statute was validly extended, under any interpretation of I.R.C. § 6501(c)(4)(B). However, as noted above, the position of Chief Counsel is that a statute extension will also be defended if:

Service personnel furnished the taxpayer or representative with a copy of any of these specific revisions of Publication 1035: Rev. 12-1999, Rev. 8-1996, or Rev. 8-1987

While we do not know which Publication 1035 was provided the taxpayer in this case, it seems to this office that it must have been one of these three versions. Perhaps these are the only versions of Publication 1035 that have been issued. In any event, it would appear the extension is valid. Accordingly, we suggest that you proceed as if the extension is valid, and that you execute the Forms 870-S on behalf of the Service if you agree with the recommended disposition of the audit.

This memorandum contains privileged information. Any unauthorized disclosure of the contents of this document may have an adverse effect on these privileges, including the attorney-client privilege. If any disclosure is contemplated, please contact this office for our views prior to revealing any of the contents of this memorandum.

If there are any questions with regard to this memorandum, please contact Special Litigation Assistant William R. McCants of this office at 904-232-2788, extension 24.

BENJAMIN A. de LUNA
District Counsel

By:

A handwritten signature in black ink, appearing to read 'W. R. McCants', written over a horizontal line.

WILLIAM R. McCANTS
Special Litigation Assistant

Attachment:
Your file.